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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 156

LAWRENCE YEARSLEY AND GEORGE YEARSLEY,
PETITIONERS,

VS.

W. A. ROSS CONSTRUCTION COMPANY, A
CORPORATION, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Regardless of the reason for issuance of the writ of certiorari in the case of *Franklin* v. *United States*, 101 F. (2d) 459, the case at bar has been correctly decided, and the writ should not issue for these reasons:

The issues and the evidence as stated in the opinion of the court of appeals is as follows:

> "The evidence established that two dikes built in the river above, and one dike built opposite, their land had diverted the channel or the current of the river from the Iowa shore to the Nebraska shore, and that, as a result, the 'accretion land' of the plaintiffs to the extent of perhaps 95 acres had been eroded and carried away. There was also evidence tending to show that in extending the dike opposite the plain-

tiffs' land from the Iowa shore toward the Nebraska shore, the contractor, apparently to keep open an adequate channel for navigation between the end of the dike and the shore, accelerated the erosion of the plaintiffs' land by using the paddle wheels of its steamboats to increase the action of the current. There was no evidence, however, to show that this 'paddle washing' had done anything more than hasten the inevitable. It was undisputed that the work which the contractor had done in the river bed was all authorized and directed by the government of the United States for the purpose of improving the navigation of this navigable river" (Transcript of Record 182).

We have then the question of whether the work *done in the bed of the river* for the purpose of stabilizing the channel of the river in aid of navigation, as authorized by the Act of Congress (69th Congress, Chapter 47, page 1010, January 21, 1927) and which resulted in mere fixation of the watercourse within the river bed, constituted a taking of land in violation of the rights of the petitioners under the fifth amendment to the Constitution, or whether, as found by the court of appeals, the erosion of the "accretion land" was but consequential and incident to the public undertaking, which must be borne without right to compensation.

The legal question in this case is limited to the power of the government to improve a navigable river for purposes of carrying on commerce between the various states by doing work along the bank and in the bed of the river, which diverts the current so that it washes away accreted lands upon the opposite shore, but which does not involve the taking of any "fast land," without being required to make compensation therefor.

While it is true that the court of appeals did apply the same legal principles to this case as applied by the Sixth Circuit Court of Appeals in the *Franklin Case, supra*, yet, it followed the controlling decisions of this court in the cases of *Transportation Company v. Chicago*, 99 U. S.

635, 642; *Gibson* v. *United States*, 166 U. S. 269, 275; *Scranton* v. *Wheeler*, 179 U. S. 141, 163; *Bedford* v. *United States*, 192 U. S. 217, 225; *United States* v. *Chandler-Dunbar Water Power Company*, 229 U. S. 53, 70, 72; *Jackson* v. *United States*, 230 U. S. 1, 23; *Hughes* v. *United States*, 230 U. S. 24, 32-34; *United States* v. *Archer*, 241 U. S. 119, 148; *United States* v. *Cress*, 243 U. S. 316, 327; *John Horstmann Company* v. *United States*, 257 U. S. 138, 145-146; *Sanguinetti* v. *United States*, 264 U. S. 146, 150.

In the case of *United States* v. *Chandler-Dunbar Water Power Company*, 229 U. S. 53, this court said:

> "This title of the owner of fast land upon the shore of a navigable river to the bed of the river is, at best, a qualified one. * * * It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. That power of use and control comes from the power to regulate commerce between the states and with foreign nations. It includes navigation and subjects every navigable river to the control of Congress. All means having some positive relation to the end in view which are not forbidden by some other provision of the Constitution are admissible. If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation. * * *
>
> "So unfettered is this control of Congress over navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a hindrance to navigation is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control."

The Congress of the United States in the act authorizing the improvement (69th Congress, Chapter 47,

page 1010, January 21, 1927) conclusively determined the necessity for the improvement and the purpose of it, in this language:

> "Missouri River, between Kansas City, from the upper end of Quindaro Bend, and Sioux City, Iowa, in accordance with the report of the Board of Engineers for Rivers and Harbors submitted in House Document numbered 1120, Sixtieth Congress, second session, with a view to securing a permanent navigable channel six feet in depth and to conform to the character and methods of improvement of said river, now defined and proceeding under existing law."

Congress thereby recognized that obstructions existed in the bed of the river; that it had no permanent channel six feet deep. No one contests the power of Congress to find that it is necessary to have a "permanent navigable channel six feet in depth" in order to carry on commerce between the states:

In *Gilman* v. *Philadelphia*, 3 Wall. 713, l. c. 724, in speaking of the unrestricted power of Congress to keep navigable rivers open and free from obstructions, this court said:

> "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the states or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the states before the adoption of the National Constitution, and which have always existed in the Parliament in England.

> "It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."

The sole purpose of placing the dikes in the river was to "stabilize the channel" of the river and to remove obstructions to navigation. By "stabilizing the channel" is merely meant to fix the channel and prevent the river from meandering from place to place—to so locate the wandering stream as to make it available for navigation. The purpose of stabilizing the channel was not to make it enter into or cut a new course, but merely to prevent it from changing from place to place and to fix it in a place it has from time to time occupied.

In *Bedford* v. *United States*, 192 U. S. 217, suit was for damage alleged to have resulted from government works upon the Mississippi river which caused the erosion of Bedford's land. The works consisted of placing revetment along the river bank which diverted the course of the stream and eroded the land. *The contention was there made* by the landowners (as it is made in this case) *that the riparian owner has a right to the unrestrained operation of natural causes, and that works of the government which resist or disturb those causes, if injury occurs* have the effect of taking private property for public uses within the meaning of the 5th Amendment. This court denied that contention, saying:

> "The principle contended for seems necessarily wrong. Asserting the rights of riparian property, it might make that property valueless. Conceding the power of the government over navigable rivers, it would make that power impossible of exercise, or would prevent its exercise by the dread of an immeasureable, responsibility.
>
> "There is another principle by which the rights of riparian property and the power of the government over navigable rivers are better accommodated. It is illustrated in many cases.

"The Constitution provides that private property shall not be taken without just compensation, but a distinction has been made between damage and taking, and that distinction must be observed in applying the constitutional provision. An excellent illustration is found in *Gibson* v. *United States*, 166 U. S. 269, 41 L. Ed. 996, 17 Sup. Ct. Rep. 578. The distinction is there instructively explained, and other cases need not be cited. It is, however, necessary to refer to *United States* v. *Lynah*, 188 U. S. 445, 47 L. Ed. 539, 23 Sup. Ct. Rep. 349, as it is especially relied upon by appellants. The facts are stated in the following excerpt from the opinion:

> 'It appears from the 5th finding, as amended, that a large portion of the land flooded was, in its natural condition, between high-water mark and low-water mark, and was subject to overflow as the water passed from one stage to the other; that this natural overflow was stopped by an embankment, and in lieu thereof, by means of floodgates, the land was flooded and drained at the will of the owner. From this it is contended that the only result of the raising of the level of the river by the government works was to take away the possibility of drainage. But findings IX and X show that, both by seepage and percolation through the embankment and an actual flowing upon the plantation above the obstruction, the water has been raised in the plantation about 18 inches; that it is impossible to remove this overflow of water, and, as a consequence, the property has become an irreclaimable bog, unfit for the purpose of rice culture or any other known agriculture, and deprived of all value. It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog; and this as the necessary result of the work which the government has undertaken.'

"The question was asked: 'Does this amount to a taking?' To which it was replied: 'The case of *Pumpelly* v. *Green Bay & M. Canal Co.*, 13 Wall. 166,

20 L. Ed. 557, answers this question in the affirmative.' And further: 'The Green Bay Company, as authorized by statute, constructed a dam across Fox river, by means of which the land of Pumpelly was overflowed and rendered practically useless to him. There, as here, no proceedings had been taken to formally condemn the land.' In both cases, therefore, it was said that there was an actual invasion and appropriation of land as distinguished from consequential damage. In the case at bar the damage was strictly consequential. It was the result of the action of the river through a course of years. The case at bar, therefore, is distinguishable from the Lynah case in the cause and manner of the injury. In the Lynah case the works were constructed in the bed of the river, obstructed the natural flow of its water, and were held to have caused, as a direct consequence, the overflow of Lynah's plantation. In the case at bar the works were constructed along the banks of the river, and their effect was to resist erosion of the banks by the waters of the river. There was no other interference with natural conditions. Therefore, the damage to appellants' land, if it can be assigned to the works at all, was but an incidental consequence of them."

In *Jackson* v. *United States*, 230 U. S. 1, this court held that the construction of a levee by the government on the west side of the Mississippi river which raised the water so that the lands on the east side were flooded, would not subject the government to damages for the land so taken, because the damages were remote and consequential. In the course of the opinion it was said:

> "* * * It is certain there would be no right on the part of an individual to insist that primitive conditions be suffered to remain, and thus all progress and development be rendered impossible."

The petitioners are in reality claiming that the primitive conditions be permitted to remain. They have asserted that the river was gradually moving to the east

until the work was begun which pushed the river back to the west.

There is no claim made that the land of petitioners was actually invaded by defendant by any trespass upon it. It is conceded that all of the eroded land had been built up by the river in the last few years before the work was commenced. In the brief petitioners now claim that the erosion of the land was precipitous, but, in their damage petition, they claimed that the erosive process occurred over a period of three years (see Record page 10).

The opinion of the court of appeals clearly shows that the work was authorized by Congress for the benefit of navigation, and that liability for the remote and consequential damages resulting thereupon does not attach. The case was clearly distinguished by the court of appeals from that line of cases such as, *United States* v. *Lynah*, 188 U. S. 445, 470, upon which petitioners rely by pointing out that in those cases there was an actual invasion of property by damming up the waters of the stream so as to artificially create a trespass, whereas in this case, the works only, in fact, prevented erosion from the Iowa bank of the river.

In the *Jackson Case, supra,* this court said:

> "We say this because the plenary power of the United States to legislate for the benefit of navigation, and to construct such works as are appropriate to that end, without liability, for remote or consequential damages, has been so often decided as to cause the subject not to be open. It was directly ruled as to work done by the Mississippi River Commission in *Bedford* v. *United States*, 192 U. S. 225, 48 L. Ed. 417, 24 Sup. Ct. Rep. 238, upon the authority of which case, as we have said, the court below placed its ruling, and as the underlying principles which controlled the decision in the Bedford case, and which govern the subject, were again at this term, with much elaboration, stated and applied, we think it unnecessary to do more than refer to that ruling

(*United States* v. *Chandler-Dunbar Water Power Co.* decided May 26, 1913, 229 U. S. 53, 57 L. Ed. , 33 Sup. Ct. Rep. 667), and to direct that the judgment below be affirmed."

The case falls clearly within the principle of *Sanguinetti* v. *United States*, 264 U. S. 146, and the other cases relied upon, when it is recognized that there was no fixed or permanent bank line of the river at the place in question, and that the stream had meandered over the land many times in the past. It would be mere conjecture to say that the river would not, unaided by any force, again eat away petitioners' accreted land. This court points out the distinction between the two lines of cases in the *Sanguineti Case*, *supra*, and there, recognizing that the government works had increased the flooding of the land, held that the injury was indirect and consequential for which no implied obligation on the part of the government could arise.

Since it cannot be claimed that the improvement in question, which was in aid of navigation, did more than augment a natural condition which had in the past existed and which would probably again recur, it follows that petitioners' damage was indirect and consequential, and the court of appeals reached the right conclusion in holding that the alleged damage was not compensable.

The writ of certiorari should not be granted.

Respectfully submitted,

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